

No. 15269

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

F. C. HATHAWAY,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Oregon

FILED

NOV - 9 1956

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Phillips & Von Orden Co., 870 Brannan Street, San Francisco, Calif.—10-19-56

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon,  
Attorney for Appellee.



In the United States District Court  
for the District of Oregon

Civil No. 7443

**F. C. HATHAWAY,**

**Plaintiff,**

**vs.**

**UNITED STATES OF AMERICA,**

**Defendant.**

**COMPLAINT**

**I.**

This suit arises out of a contract between the plaintiff and the defendant and the amount of claim does not exceed \$10,000.

**II.**

On or about the 20th day of March, 1952, plaintiff and defendant entered into a contract No. DA-(S)-35-026-eng-12 for the sale of lock gates located at the old government locks, Cascade Locks, Oregon.

**III.**

On or about the 31st day of October, 1952, said contract was modified.

**IV.**

The plaintiff has been at all times ready and willing to perform said contract, as modified.

**V.**

Defendant has refused to perform said contract and has purported to terminate plaintiff's rights thereunder.

**VI.**

By reason of defendant's breach of said contract, plaintiff has been damaged in the sum of \$14,500.00.

For a Second Cause of Suit, Plaintiff Alleges as Follows:

**I.**

On or about the 20th day of March, 1952, plaintiff and defendant entered into a contract No. DA-(S)-35-eng-12 for the sale of lock gates located at the old government locks, Cascade Locks, Oregon.

**II.**

On or about the 31st day of October, 1952, said contract was modified.

**III.**

Because of reasons beyond the control of plaintiff, it was impossible for plaintiff to remove one-half of the steel covered by said contract.

**IV.**

Plaintiff and defendant were mutually mistaken as to the conditions existing at the site of Cascade Locks at the time said contract was entered into.

**V.**

By reason of the mutual mistake of the parties and the impossibility of removing more than one-half of the steel covered by said contract, said contract should be reformed by reducing the contract price by one-half.

Wherefore, plaintiff demands:

- (1) That said contract be reformed to provide for a purchase price of \$3,750.00.
- (2) That plaintiff have judgment against the defendant for the sum of \$10,000.
- (3) That plaintiff have judgment against the defendant for costs.

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 7, 1954.

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[Title of District Court and Cause.]

#### ANSWER OF THE UNITED STATES

Comes now defendant United States of America, by and through C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, by direction of the Attorney General of the United States, and for answer to plaintiff's first cause of action herein, admits, denies and alleges as follows:

1. Admits the allegations of Paragraphs I, II and III.
2. Denies the allegations of Paragraph IV.
3. Denies the allegations of Paragraph V, except defendant admits that plaintiff's right to proceed under his contract was terminated by reason of his unilateral and inexcusable default.

4. Denies the allegations of Paragraph VI and the whole thereof and specifically denies that defendant breached said contract, and further specifically denies that plaintiff was damaged in the sum of \$14,500.00 or in any other amount.

For Answer to Plaintiff's Second Cause of Action,  
Defendant Admits, Denies and Alleges as Follows:

1. Admits the allegations of Paragraphs I and II.

2. Denies the allegations contained in Paragraphs III and IV.

3. Denies the allegations of Paragraph V and particularly denies that there was a mutual mistake of the parties; denies further that it was impossible to remove more than  $\frac{1}{2}$  of the steel, covered by said contract; and further denies that the contract should be reformed by reducing the contract price by  $\frac{1}{2}$  or any other percentage.

#### First Further and Affirmative Defense

The complaint does not properly state a claim upon which relief can be granted.

#### Second Further and Affirmative Defense

The Court has no jurisdiction of this claim, as alleged.

#### Third Further and Affirmative Defense

The plaintiff has failed to pursue his administrative remedies for relief and therefore the acts complained of are not actionable under statute or at all.

**Fourth Further and Affirmative Defense**

Defendant and all its agencies and employees exercised due care in all matters referred to in the complaint.

**Fifth Further and Affirmative Defense**

All damage, loss or injury described in the complaint was caused, if at all, by the voluntary and unilateral action of the plaintiff.

**Sixth Further and Affirmative Defense**

Defendant denies each allegation of fault or wrongful conduct set forth in the complaint or otherwise, and alleges that if plaintiff suffered any damage, loss or injury, such loss, damage or injury was due solely to plaintiff's own negligence, mistakes and lack of good judgment in failing to inform himself of the nature of the operations which he was about to undertake, and in failing to diligently perform his contractual obligations, and specifically, in failing to pay for and remove the steel purchased from defendant, as per his contract, prior to December 1, 1952, or subsequent thereto.

**Seventh Further and Affirmative Defense**

No act or failure to act of defendant or any employee of defendant was the proximate cause of any damage, loss or injury, if any, to plaintiff.

**Eighth Further and Affirmative Defense**

The defendant's liability if any, is contractually limited by Paragraph 11 of the General Conditions of the plaintiff's contract, which reads as follows:

“11. Limitation on Government liability. In any case where liability of the Government to the Purchaser has been established, the extreme measure of the Government’s liability shall not, in any event, exceed refund of the purchase price or such portion thereof as the Government may have received.”

By way of counterclaim, defendant United States of America alleges as follows:

1. On or about March 20, 1952, plaintiff, F. C. Hathaway, and defendant, United States of America, by and through its Contracting Officer of the Portland District, Corps of Engineers, U. S. Army, entered into Contract for sale of the government-owned lock gates at Cascade Locks, Oregon, on an “as is—where is” basis.
2. Plaintiff, as successful bidder was to pay the sum of \$7,500 for said government property prior to its removal from the government premises and to accomplish same prior to December 1, 1952.
3. To date, plaintiff has paid only the initial payment of \$1,500 to the government defendant.
4. Although the plaintiff’s contract performance time, without consideration from plaintiff, was informally allowed to extend to January 4, 1954, he only succeeded in removing approximately ½ of the salvageable material by said date and his right to proceed further was terminated by this default by the government at that time.

5. The defendant, as seller of its property, made no representations, no warranties, express or implied, or in no way misdirected or misinformed the plaintiff purchaser as to the difficulties of removal of the property, and, in fact, the government stands ready today to pass title to the remaining property upon full payment of the contract price by plaintiff in fulfillment of the contract terms.

6. The government has not prevented the plaintiff purchaser from performing in any way, nor has the government breached its contractual responsibilities at all.

7. By reason of plaintiff purchaser's default the government was compelled to sell the lock gates already removed by plaintiff to the highest bidder for the sum of \$4,387.98. This left a deficit balance due and owing from the plaintiff of \$1,612.02 for which demand was made. No effort has been made by plaintiff to pay this contractual obligation.

8. The defendant, United States of America, is entitled to its balance due and owing from the plaintiff in the amount of \$1,612.02.

Wherefore, defendant United States of America prays:

1. That plaintiff take nothing by his actions or either of them;
2. That the defendant, United States of America, be awarded its damages under contract in the amount of \$1,612.02; and

3. That the Court award to defendant its costs in this action and such further relief as the Court may deem proper.

C. E. LUCKEY,

United States Attorney for  
the District of Oregon.

/s/ VICTOR E. HARR,

Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed September 16, 1954.

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In the United States District Court  
for the District of Oregon

Civil No. 7443

F. C. HATHAWAY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPLY

Comes now the plaintiff and for reply to defendant's counterclaim herein, denies each and every allegation, thing and matter in said Counterclaim contained, except insofar as said counterclaim admits the allegations of plaintiff's complaint on file herein.

Wherefore, having fully replied, plaintiff prays

that defendant take nothing by his counterclaim and that plaintiff have judgment as prayed for in his complaint herein.

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed September 21, 1954.

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[Title of District Court and Cause.]

### PRETRIAL ORDER

Before the Honorable Gus J. Solomon, Judge.

Appearances:

WALTER J. COSGRAVE,  
Attorney for Plaintiff.

VICTOR E. HARR,  
Assistant United States Attorney, Attorney  
for defendant.

### Nature of Proceedings

This is an action by plaintiff under § 1346, Title 28 USCA (Tucker Act) to recover from the United States damages for a breach of contract between plaintiff and the United States. Plaintiff also seeks reformation of the contract with respect to the contract price of the steel locks which were the subject of the contract.

The defendant in this proceeding denies its in-

debtedness to plaintiff in any amount, denies plaintiff is entitled to reformation of the contract, and by way of counterclaim, seeks judgment against plaintiff for damages for unpaid balance due on the aforesaid contract.

#### Agreed Facts

1. This suit arises out of a contract between the plaintiff and the defendant and the amount of the claim does not exceed \$10,000.
2. On or about the 20th day of March, 1952, plaintiff and defendant entered into a contract numbered DA-(S)-35-026-eng-12 for the sale of certain steel lock gates located at the old Government locks, Cascade Locks, Oregon, which locks were below the level of the waters of the lake formed by Bonneville Dam.
3. Under the contract plaintiff agreed to buy and defendant agreed to sell approximately 985.3 gross tons of steel contained in 4 sets of lock gates for a price of \$7,500, \$1,500 of which was paid as a bid deposit and the balance of which was required to be paid prior to December 1, 1952, or prior to the removal of any property. Plaintiff made no further cash payments to defendant.
4. That in the fall of 1953, plaintiff removed from the water a part of the property to be salvaged under this contract of the approximate weight of 517 tons which was placed by plaintiff on the banks of the old lock canal at Cascade Locks, Oregon. On February 3, 1954, defendant extended invi-

tations to bid upon the aforesaid 517 tons of steel, and thereafter sold said steel for the sum of \$4,387.98.

5. That defendant on March 12, 1954, notified plaintiff that it was crediting to plaintiff the amount received on the aforesaid bid, to wit: \$4,387.98.

### Plaintiff's Contentions

1. On October 31, 1952, the parties modified the contract to permit removal of the salvaged property from the government premises directly to the contractor's points of sale in Portland, Oregon, subject to the condition that the government should be furnished certified scale weight of each load removed and should receive upon delivery to the contractor's point of sale the full amount received for each such load; such procedure was to continue until the government had received full payment under the contract, after which title to the remaining scrap would vest in the contractor.

2. The government refused to recognize as effective the modification of October 31, 1952.

3. The government refused to allow the removal of any portion of the salvage steel until the full contract price was paid and threatened to prevent such removal by force.

4. The defendant extended the time for completion of the contract to January 4, 1954, and on that date arbitrarily purported to terminate all of plaintiff's rights under the contract.

5. Time for payment of the purchase price and removal of the steel was extended by defendant to January 4, 1954.

6. The government claims to have terminated all rights of the contractor as of January 4, 1954, for nonpayment of the full purchase price.

7. The parties were equally mistaken as to the amount of steel which it was practically possible to remove from the old Cascade Locks.

8. Only one-half of the amount of steel which the parties contemplated would be removed was physically possible of removal.

9. The contract should be reformed by reducing the purchase price to one-half or \$3,750.

10. If defendant had allowed plaintiff to remove the steel as salvaged in accordance with the modification of October 31, 1952, said steel could have been sold at prices which would have brought to plaintiff a total of \$14,500.

11. By reason of the government's wrongful refusal to allow the removal of the steel in accordance with the modification and their threat of force to prevent such removal, plaintiff was damaged in the sum of \$14,500.

#### Defendant's Contentions

1. Answering Plaintiff's Contention No. 1, defendant admits that its contracting officer executed what purported to be a modification of the contract herein, but the defendant affirmatively contends that

said modification was ineffectual, and further that said purported modification was invalid since there was no consideration or benefit passed to defendant in support thereof; defendant further contends that said modification, if valid, did not change in any way any of the remaining terms, covenants and conditions of said contract, and in particular did not change the date within which plaintiff was to have performed under said contract.

2. Answering Plaintiff's Contention No. 2, defendant admits that it did not consider said purported modification as having been valid as is hereinbefore set forth.

3. Denies Plaintiff's Contention No. 3.

4. Denies Plaintiff's Contention No. 4 in that defendant asserts that it extended to plaintiff no express extension of time herein, but did, in effect, by sufferance, waive time of completion of said contract up to January 4, 1954, and did, by registered letter dated December 15, 1953, advise plaintiff that he was being given until January 4, 1954, to meet his contractual obligations, and, failing to do so, all his rights under the within contract would terminate on January 4, 1954; that plaintiff did not fulfill the terms of said contract and defendant did, on January 4, 1954, terminate said contract for nonpayment and nonperformance.

5. In answer to Plaintiff's Contention No. 5, defendant, by this reference, incorporates all of the affirmative contentions set forth in its Contention No. 4 aforesaid.

6. Admits Plaintiff's Contention No. 6 and further realleges and incorporates herein, all of the affirmative allegations contained in its Contention No. 4 aforesaid.

7. Answering Plaintiff's Contention No. 7, defendant contends that the contracting parties herein, among other things, agreed as follows:

That "all property listed herein is offered for sale 'as is,' and 'where is,' and without recourse against the government \* \* \* The description is based on the best available information, but the government makes no guarantee, warranty, or representation, express or implied, as to the quantity, kind, character, quality, weight, size, or description of any of the property or its fitness for any use or purpose, and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected \* \* \*"

and the parties further agreed that the bidders, including plaintiff, were invited and urged to inspect the property to be sold herein prior to the submitting of bids, and by reason of aforesaid, defendant contends that Plaintiff's Contention No. 7 is not and cannot be material to the issues of this case. Should the court determine that Plaintiff's Contention is an issue in this case, then defendant denies Plaintiff's Contention No. 7 and the whole thereof.

8. Defendant contends that Plaintiff's Conten-

tion No. 8 is not material to the issues of this case, by reason of the affirmative allegations set forth by defendant in its Contention No. 7, which, by this reference, is made a part hereof. Should the court determine that this contention is material to the issues of this case, then defendant denies said contention and the whole thereof.

9. Answering Plaintiff's Contention No. 9, defendant asserts that plaintiff has failed to allege any fact upon which relief prayed for can be granted, and, therefore, denies this contention and the whole thereof, and, further, in answer to this contention, defendant by this reference realleges all of the affirmative allegations set forth in its Contention No. 7 herein.

10. Answering Plaintiff's Contention No. 10, defendant denies that on October 31, 1952, it modified the contract herein, and denies the remaining allegations of plaintiff's said contention. Should the court determine that the said contract was modified, as contended, then defendant denies that it prevented plaintiff from removing the salvaged steel, and further denies that at the time plaintiff salvaged said steel, more than 18 months after he entered into the within contract, he could have sold the salvaged steel for a sum of \$14,500, and affirmatively alleges that plaintiff, because of the steady drop in the prices of steel that continued from the time of the awarding of the within contract, and because of plaintiff's procrastination and delay in entering upon and proceeding to act under the contract, plaintiff could not have sold said steel for more than \$7,238.

11. Answering Plaintiff's Contention No. 11, defendant denies that it was guilty of any wrongful conduct, denies that it refused by threat of force or otherwise to allow plaintiff to remove salvaged steel from defendant's premises, and specifically denies that plaintiff was damaged in the sum of \$14,500 or in any other amount.

12. Defendant, its agents and employees, during all times herein, exercised due care in all matters referred to in plaintiff's contentions.

13. That although the contract awarded in response to plaintiff's bid herein was accepted by defendant on March 20, 1952, and although under the contract plaintiff was to have paid for and removed all of said property on or before December 1, 1952, plaintiff made no attempt prior to December 1, 1952, to remove any of the property herein involved, and any and all damages, if any, suffered by plaintiff, were, therefore, due to his own breach of the contract.

14. That no property was salvaged by plaintiff under this contract until during the fall of 1953, at which time plaintiff removed approximately one-half of the steel covered by the aforesaid contract, and thereafter plaintiff failed and refused to proceed further under the said contract or to sell the steel thus removed, but allowed it to lie upon the banks of defendant's canal.

15. That defendant has done no act or thing between the 20th day of March, 1952, and the 4th

day of January, 1954, in preventing plaintiff from performing under the within contract, nor has the government breached any covenant or condition contained in the aforesaid contract.

16. By reason of plaintiff's default and because plaintiff failed and refused to sell the locks that he had salvaged, and since the great weight of the salvaged locks on the banks of the canal was a hazard, defendant was compelled to and did, as plaintiff's agent, sell the locks to the highest bidder for the sum of \$4,387.98, said sum being the largest amount that could be obtained for said steel at said time and place. That after crediting the said sum to the delinquent balance then owing by plaintiff, there was due and owing from plaintiff to defendant the sum of \$1,612.02.

17. That the defendant in advertising and selling the lock gates herein involved to plaintiff, did so on an "as is—where is" basis and made no representations or warranties, express or implied, or in any way misdirected or misinformed plaintiff as to the difficulties of removal of the said property, and in fact, defendant now stands ready to pass title to the remaining property to plaintiff upon plaintiff's paying the full contract price in fulfillment of the contract terms. All the terms and conditions of paragraph 2 of "the general sales terms and conditions" are incorporated herein by this reference.

18. That notwithstanding the contract provision providing that plaintiff must remove the said property on or before December 1, 1952, the defendant

nevertheless by sufferance allowed plaintiff up to January 4, 1954, to fulfill and carry out the terms agreed to by him.

19. There was no formal extension of time between the parties to this contract, and defendant did on December 15, 1953, by registered letter, return receipt requested, directed to plaintiff, advise him that the government allowed him until January 4, 1954, within which to meet the balance of his contract obligations, and that if he did not do so on or before that date, that the defendant would thereby terminate all of his rights possessed under the aforesaid contract.

20. That being in default under said contract and in accordance with an option contained in said contract, defendant gave plaintiff ten days written notice that plaintiff was being given until January 4, 1954, to meet the balance of his contract obligation to defendant, and if he failed to do so that on said date defendant would terminate all further rights of plaintiff in said contract; that plaintiff did not fulfill the terms of said contract by said date of January 4, 1954, and defendant did on said date terminate the said contract, thereby cancelling all of plaintiff's rights thereunder.

21. That if plaintiff suffered any damage, loss or injury, such loss, damage or injury was due solely to plaintiff's own negligence, mistakes, and lack of good judgment in failing to inform himself of the amount, condition and location of the materials to be salved and the cost and extent of the

operations which he would have to undertake if he were the successful bidder; and further that any loss, damage or injury was further contributed to by plaintiff's lack of interest and procrastination in failing to diligently and promptly perform under the contract, and specifically in failing to pay for and remove the steel purchased under said contract prior to December 1, 1952, or at any other time up to January 4, 1954, although defendant did continually and at all times demand that he fulfill the terms of the contract.

22. That no act or failure to act of defendant, or any agent or employee of defendant, was the proximate cause of any damage, loss or injury sustained by plaintiff.

23. That defendant's liability, if any, is contractually limited by Paragraph 11 of the General Conditions of the plaintiff's contract, which reads as follows:

“11. Limitation on Government liability. In any case where liability of the Government to the Purchaser has been established, the extreme measure of the Government's liability shall not, in any event, exceed refund of the purchase price or such portion thereof as the Government may have received.”

24. That if plaintiff had a valid dispute under the aforesaid contract, he failed to exercise his rights to appeal by virtue of clause 15 of said contract, and the defendant therefore asserts that be-

cause of his failure to pursue his administrative remedies, the acts complained of by plaintiff are not actionable herein.

25. That plaintiff's claim should be disallowed and defendant should be given judgment against plaintiff in the sum of \$1,612.02, together with interest thereon at the rate of 6% per annum from December 1, 1952, and for its costs and disbursements herein incurred.

26. That if the court finds that the modification of October 31, 1952, was valid and binding upon the parties herein and operated to extend the time within which plaintiff was to complete performance under the contract, then defendant contends that said agreement implied that plaintiff would have a reasonable time to remove said steel and to make full and final payment of the purchase price of said steel; that the granting to plaintiff by defendant until January 4, 1954, to perform in the premises fully, was reasonable.

27. Since plaintiff's salvage operations were concluded and fully terminated prior to October 12, 1953, defendant was legally justified under the terms of said contract in terminating plaintiff's rights under said contract on January 4, 1954, and in selling the salvaged steel for the account of plaintiff.

28. The finding of December 15, 1953, by the contracting officer or those authorized to act for him, was a determination of a dispute involving a speci-

fication of the contract herein involved, and since plaintiff did not appeal therefrom within the time as set forth in the "Disputes" clause of the said contract, said findings and determination were final and conclusive upon the parties herein.

### Issues of Fact and Law

1. Whether the parties were mutually mistaken as to the amount of steel which it was possible to remove from the canal.

(Defendant contends that this is not an issue in this case.)

2. If the parties were mistaken, to what extent should the contract be reformed with respect to the amount of the purchase price?

(Defendant contends that this is not an issue in this case.)

3. Whether the contracting officer modified the contract by modification of the one dated October 31.

4. Whether the defendant breached the contract as modified.

5. Whether the defendant suffered any damages as a result of said breach, if any.

6. What amount, if any, is plaintiff entitled to recover from defendant or defendant entitled to recover from plaintiff?

### EXHIBITS

Plaintiff's:

1. Original of invitation bid and acceptance

signed by F. C. Hathaway and L. W. Bixby, Contracting Officer.

2. Modification No. 1 dated October 31, 1952.
3. Letter from plaintiff to Corps of Engineers, U. S. Army, dated October 12, 1953.
4. Letter dated December 15, 1953, from John A. Graf to plaintiff.
5. Letter dated January 6, 1954, to L. W. Bixby from L. C. Hathaway.
6. Letter dated March 12, 1954, to F. C. Hathaway from John A. Graf.
7. Plan and section drawing of Cascade Locks, dated February 19, 1952.

Defendant's:

8. Letter dated November 21, 1952, from F. C. Hathaway to Corps of Engineers.
9. (a) "Invitation to Bid," February 3, 1954, covering lot, scrap, iron or steel of approximately 517 tons.
  - (b) Office Memo, February 17, 1954, Bixby to Legal Branch.
  - (c) Copy "Collection Voucher," March 3, 1954, sent to plaintiff.
  - (d) Registered letter, March 12, 1954, Graf to Hathaway.
10. Memo, October 30, 1952, Luehring.
11. Letter, March 8, 1955, Mears to Corps of Engineers.

[The following were substituted by order  
12/13/55.]

Plaintiff's:

12. Memo, October 30, 1952, Luehring.
13. Photographs a to b included.

Defendant's:

14. Photostats of Log entries "Cascade."
15. Deposition, Lewis Smith.

It Is Hereby Ordered that the foregoing is a pre-trial order in the above-entitled case, that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pretrial order shall not be amended upon trial except by consent or by order of the court to prevent manifest injustice.

Dated this 18th day of April, 1955.

/s/ GUS J. SOLOMON,  
District Judge.

The Foregoing Form of Pretrial Order Is Hereby Approved:

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff.

/s/ VICTOR E. HARR,  
Assistant United States Attorney, of Attorneys for Defendant.

[Endorsed]: Filed April 18, 1955.

[Title of District Court and Cause.]

## MEMORANDUM

Some difficulties I see in the way of plaintiff's recovery:

1. In the fall of '52 when the diver first went down, plaintiff knew or should have known, he could only get out half the gates.
2. Knowing this, he accepted the modification of October 31, 1952, which still calls for full payment only in different manner.
3. When the contracting officer at the instance of the legal department repudiated the modification agreement, plaintiff should have stopped them to minimize his damages.
4. That he could have got the steel to Portland to avail of the \$28.00 offer is speculative; likewise, that he could have processed the 500 odd tons that were salvaged into smaller pieces.

If counsel desire to submit further memoranda I will be glad to consider them.

Dated December 30, 1955.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed December 30, 1955.

In the United States District Court  
for the District of Oregon

Civil No. 7443

F. C. HATHAWAY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND JUDGMENT**

This cause having come one regularly for trial before the undersigned Judge of the above-entitled Court, plaintiff appearing in person and by Mr. Walter J. Cosgrave, his attorney, and the defendant appearing by Mr. Victor E. Harr, Assistant United States Attorney, and the Court having heard the evidence adduced by the parties and the arguments of counsel, and the Court having taken the matter under advisement and thereafter the case having been reargued by counsel and the Court being fully advised, now makes the following:

**Findings of Fact**

1. This suit arises out of a contract between the plaintiff and the defendant, and the amount of the claim does not exceed Ten Thousand Dollars (\$10,000.00).

2. On or about the 20th day of March, 1952, plaintiff and defendant entered into a contract

numbered DA-(S)-35-026-eng-12 for the sale of certain steel lock gates located at the old Government locks, Cascade Locks, Oregon, which locks were below the level of the waters of the lake formed by Bonneville Dam.

3. Under the contract plaintiff agreed to buy and defendant agreed to sell approximately 985.3 gross tons of steel contained in 4 sets of lock gates for a price of \$7,500, \$1,500 of which was paid as a bid deposit.

4. In the Fall of 1953, plaintiff removed from the water a part of the property to be salvaged under this contract of the approximate weight of 517 tons which was placed by plaintiff on the banks of the old lock canal at Cascade Locks, Oregon. Defendant extended invitations to bid upon the aforesaid 517 tons of steel, and thereafter sold said steel for the sum of \$4,387.98.

5. On March 12, 1954, defendant credited to plaintiff the amount received on the aforesaid bid, to wit: \$4,387.98.

6. The parties were mutually and equally mistaken as to the amount of steel which it was practicably possible to remove from the old Cascade Locks.

7. Only one-half of the amount of the steel which the parties contemplated could be removed was practicably possible of removal.

8. The parties each understood that all of such

steel could be removed, and neither intended that the contract would include steel which could not be so removed.

Based upon said Findings of Fact, the Court makes the following:

#### Conclusions of Law

1. The purchase price should be reduced one-half, or \$3,750.00.
2. Plaintiff has overpaid defendant in the amount of \$2,137.98.
3. Defendant is not entitled to prevail on its counterclaim.

Now, Therefore, based upon said Findings of Fact and Conclusions of Law, it is

Ordered, that judgment be entered in favor of plaintiff and against the defendant in the sum of Two Thousand One Hundred Thirty-Seven and 98/100 Dollars (\$2,137.98) and that defendant take nothing by its counterclaim. No costs.

Dated this 19th day of April, 1956.

/s/ CLAUDE McCOLLOCH,  
Judge.

Lodged April 18, 1956.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: F. C. Hathaway, Plaintiff, and Walter J. Cosgrave, Esquire, Maguire, Shields, Morrison & Bailey, attorneys for Plaintiff:

Notice is hereby given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 19th day of April, 1956, in favor of plaintiff and against defendant.

Dated this 14th day of June, 1956.

C. E. LUCKEY,

United States Attorney for  
the District of Oregon;

/s/ VICTOR E. HARR,

Assistant United States Attorney, of Attorneys for  
Defendant.

[Endorsed]: Filed June 14, 1956.

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[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard ex parte this day upon motion of defendant-appellant, through its attorneys, C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order ex-

tending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable the reporter to complete the transcript of testimony, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal and docketing the action be and it is hereby extended to ninety days from June 14, 1956, the first date of filing the Notice of Appeal.

Dated this 18th day of July, 1956.

/s/ CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed July 18, 1956.

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In the United States District Court  
for the District of Oregon

No. Civil 7443

F. C. HATHAWAY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Claude McColloch, Chief Judge.

December 13, 1955.

Appearances:

WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff.

VICTOR E. HARR,

Assistant United States Attorney, of Attorneys for Defendant.

\* \* \*

F. C. HATHAWAY

the plaintiff herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cosgrave: [2\*]

\* \* \*

Q. Had you ever done any of this kind of salvage work before?

A. No, not of this particular type. A lot of other types of work, but nothing like this.

Q. You had not done any diving or removing—had you ever done any diving?

A. Well, I have myself a little bit once, a long time ago.

Q. You have never done any commercial diving?

A. No, never.

Q. You haven't had any experience with removing lock gates before?

A. No, I haven't. [3]

\* \* \*

Q. All right. After the bid was awarded to you did you move up to Cascade Locks?

A. I did, yes.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of F. C. Hathaway.)

Q. Did you move your family up there?

A. First I went up by myself. Then later I moved my family up there.

Q. Then what did you do when you first got there?

A. Well, I looked the job over, tried to figure how I could best handle it. Then I was always—I knew that I still had to—at least I figured I had to pay the Government another \$6,000. I was quite sure of my finances at first, but it didn't prove out that way. And after looking the deal over, knowing what I could do and what I couldn't do, I then went back and talked to the Corps of Engineers office. [5]

\* \* \*

#### Cross-Examination

By Mr. Harr: [25]

\* \* \*

Q. You mentioned you had done some salvaging. I was wondering to what extent you had entered into that kind of work.

A. Well, I bought from the Portland Gas & Coke Company an entire plant at Astoria. That used to be the Northwest Cities Gas. I then later went back—I sold it and went back again, did a lot of dismantling and excavating, and salvaged a lot of pipe. It was all steel pipe, or that is what most of it was. And I bought railroad—just a locomotive and railroad cars, and then I had a yard of my own, a small yard, in Seaside where I bought metal.

(Testimony of F. C. Hathaway.)

Previous to that time I think we had a big school drive, or something, to help the school out.

Q. You said then that this was the first salvage operation of this type, or this was the first time that you had tried to—— [28]

A. Underwater.

Q. Yes.

A. Well, yes, that is right. I had retrieved some winches one time underneath the water, but we didn't need the services of a diver, if that is what you are referring to.

Q. Lifting 150-ton gates, you hadn't entered into any work or operations of that magnitude up to this time, had you?

A. Well, not exactly in that amount of weight, no. But I have rigged blocks to pick up Cats in its entirety out of the water, out of a mudhole. I have always been, well, we will say mechanically inclined, and I know the power of blocks and things of that nature. My dad was a machinist all his life, I guess, and worked in that kind of material.

Q. I don't want to cut you off, Mr. Hathaway, but what I was getting at primarily was this type of operation, marine operation. Had you had any previous experience in that line of operation?

A. Well, no, not so to speak. But I didn't exactly figure it was entirely a marine operation. I was going to do it from a logger's standpoint, we will say. I did prove to myself I could do it. With a little bit more elaborate work we could have gone ahead and retrieved those gates. We would still no

(Testimony of F. C. Hathaway.)

doubt have to employ a diver to hook onto the bottom gates, but as far as lifting them was concerned, I proved to myself and my friends that we could do it by just employing the use of a block and tackle— [29]

Q. You didn't deem it necessary to have a diver up there to examine the gates or the silting that had gone on to determine the feasibility of—

A. Well, naturally I was interested in the bid, because the brochure and this accompanying diagram of the locks, from that I got their information here, and I believed that we had studied it at the time and figured we had a general knowledge of it.

Q. When you say "we" whom do you mean?

A. Well, I use myself as we—I.

Q. You were operating under an assumed name, as I understand it? A. That is right.

Q. When you submitted your bid and before the bid opening did you not discuss this bid with someone in the office of the United States Engineers?

A. Did I?

Q. Did you not discuss this matter before the bids were opened?

A. No. To the best of my knowledge I didn't.

Q. Isn't it a fact that you talked to a man by the name of Matson on the telephone first? You called him long distance?

A. From Seaside?

Q. The day before the bid was opened?

A. I called someone—that is right—to get—I don't remember what I asked him, but I did call.

(Testimony of F. C. Hathaway.)

I think it was relative to the payment of the first fifteen hundred dollars, I believe. I mean if I had to bring it in myself, it was [30] getting so late. And I don't remember now. It has been two years ago almost.

Q. Didn't Mr. Matson at that time on that occasion, or the man that you talked to, tell you that you should go up and inspect the premises before bidding?

A. Did he tell me that on the phone?

Q. Yes.

A. Well, the only thing I can state to that, to the best of my knowledge, no. I couldn't say he did or did not, sir. I couldn't answer that.

Q. Then following that, the day after the bids were opened and before the award was given, did you not talk to a Mr. Burbott? A. I did.

Q. And at that time you were there and you talked personally to him, did you not?

A. I was in his office at the time, yes. It was no doubt as you say.

Q. That was after the opening and you saw all of the bids, didn't you, the bids that had been made for this deal? A. I saw the bids?

Q. Yes. A. No, I don't believe so.

Q. You were aware, weren't you—

A. I wasn't present when the bids were opened.

Q. I am not saying that you were. [31]

A. Oh.

Q. But were you not aware or made aware at

(Testimony of F. C. Hathaway.)

that time of the size of the bids that had been made?

A. Was I?

Q. Yes, yours, as contrasted to the others.

A. No, I don't remember that right then. It was later, I think that—I found out one of the next highest bids was around—oh, I don't remember. Mr. Burbott told me himself personally what the other bids were. I don't believe I asked him that. I can't recall it.

Q. You would not say that you didn't know at that time the amounts of the bids, or how much higher your bid was to the next highest bid?

A. No, I can't say that I rightly do.

Q. I will ask you whether or not at that time Mr. Burbott inquired of you whether or not you were satisfied with your bid? A. Yes.

Q. And you said yes, that you were?

A. That I was satisfied with it?

Q. Yes.

A. Well, I imagine I would have been, thinking that I intended to make some money on it, thinking I could get them out. Well, I suppose anybody would be a little bit excited if he had gotten something on a bid. I mean a chance to work, and it was something that I wanted. [32]

Q. Now, you made some comment, Mr. Hathaway, about the arrangements that you had made for financing you at first, and then you said it didn't prove out that way. I just didn't understand what you were driving at. Would you explain that a little more?

(Testimony of F. C. Hathaway.)

A. Well, yes. You mean after—I had my own \$1500, and I put that up myself. And then there was another fellow there in Seaside that was going to finance me. He was going to give me the rest of the money. And they came up and looked at the job, too, and after they come up, why, then they backed out, thinking that maybe—well, it was the time and the place made it difficult. It was a rainy, stormy, bitter day, with the east wind blowing there, and we were on top of the locks and you couldn't see anything at all except one gate on top of the wall, just one corner of the gate. There was supposedly a thousand tons of steel down there, and I had faith—I mean I knew that I could get them out, which we eventually did. But, as I say, those people were going to do the work—I mean they were going to finance me, and then they backed out.

Q. You had the \$1500. That was your own money, you said? A. That is right.

Q. And then the additional financing was to have been done by these people, your friends, or this other firm?

A. Will you repeat the question, please?

Q. You made the bid and you paid 20 per cent down, or \$1500, out of your own money, you [33] said? A. Yes.

Q. And then the additional financing was to have been accomplished through these people that you have talked about?

A. That is right. Well, not entirely, no. I could have gotten some money, I believe, if we had gone

(Testimony of F. C. Hathaway.)

along with the idea—if they hadn't backed out I think I would have gone to the mill, or something like that, and got another \$3,000, or something to go along with it, to pay off the thing to the Government.

Q. When was this that these people came up and looked over the operation and then backed out?

A. Well, let's see. It is hard to answer that. It might have been—it wasn't too long afterwards, I don't believe.

Q. It wasn't too long afterwards after what?

A. Well, I mean after I got the bid.

Q. Was it after you put in your deadman?

A. A week, or something like that. Not too long a time. I think there was—I think there was a ten-day time limit in the contract, or something like that, for the payment of the final money. I am not sure right now, but I think there is a clause in there. I think after the deposit the entire amount has to be paid within a certain length of time. [34]

\* \* \*

### ALVIN E. LEUHRING

was produced as a witness in behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Harr:

Q. State your full name.

A. Alvin E. Leuhring.

(Testimony of Alvin E. Leuhring.)

Q. What is your occupation?

A. I am an engineer.

Q. By whom are you employed?

A. I am employed by the Corps of Engineers, Portland District.

Q. State briefly your educational background.

A. I graduated from high school in 1941, entered Kansas State College in the fall of '41, the School of Engineering, where I interrupted my educational program, and I graduated from the Kansas State College School of Engineering in 1948, in June. I then enrolled in postgraduate work for the summer session, and I came to the Portland District in search of employment and was employed by the Corps of Engineers in August, the last of August, of 1948.

Q. You have been with the Government since then?

A. I have been with the Government since that time, sir.

Q. What are your particular duties with the Government at this time?

A. At this time I am assistant to the Superintendent of [113] Operations and Maintenance at Bonneville Dam.

Q. Were you so employed in 1952 and '53?

A. At that time I was assistant to the Project Engineer as part of the technical staff.

Q. The engineer at Bonneville?

A. At Bonneville.

Q. Are you acquainted with Mr. Hathaway?

(Testimony of Alvin E. Leuhring.)

A. I am, sir.

Q. I will ask you whether or not you in company with others made a survey and made up a hydrographic chart of the Cascade Locks canal and particularly the gates and the silting that existed.

A. I did, sir.

Q. Was that in February, 1952? A. '52.

Q. Do you know exactly the date that you made those soundings?

A. According to the records here, it was the 13th of February, 1952.

Q. That is the exhibit that you have seen that is in evidence in this case? A. Yes, sir.

Q. Explain how those soundings were made.

A. Those soundings were made employing a crew, together with a boat, a work boat, which we term as a sea mule. A boat's line was laid out on the island which is across the channel to [114] establish points of reference for the courses which were run. There were three courses run, A, B and C, and so designated on the exhibit. The courses were run in their respective order, A, B and C. We ran the courses from downstream upstream, at which time the lead line—the lead was thrown forward and allowed to sink gradually to the bottom, and at the moment of contact, which again depends upon the leadman's scale, the reading is taken. Now that course was followed, and the readings were taken approximately every ten feet. The resultant data, then, where we had particular interest in obtaining the check readings were retaken and the control

(Testimony of Carl B. Matson.)

Q. By whom are you employed?

A. Corps of Engineers, Portland District.

Q. How long have you been with the Corps of Engineers? A. Twenty-three years.

Q. You are an office man, I believe?

A. Yes, that is right.

Q. Did you have any conversation with Mr. Hathaway before or after the bids were opened for these lock gates that are in controversy?

A. Well, I had a conversation with him over the phone the day before the bids were opened, in which he indicated that he was going to bid, and from the conversation I gathered that he had not yet inspected the job. Our bids are all on an as is where is condition, and we prefer to have them as accurate as possible. And we also in a condition like that, where they have not inspected the property, we urge them to make an inspection, and particularly in view of this particular operation. He was urged over the phone to make an inspection prior to his submitting [164] a bid.

Q. Did you make that suggestion to him at that time yourself?

A. That is right. Following the bids I heard his conversation—at the time I was assistant to Mr. Burbott, at that particular time, and when Mr. Hathaway came in the office Mr. Burbott did call his attention to quite a difference in the high bid and the next high bid. And, as he said, Mr. Hathaway did indicate that he felt he would come out

(Testimony of Carl B. Matson.)

all right on that particular offer from his experience in logging and salvage operations. [165]

\* \* \*

### LEWIS SMITH

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Cosgrave:

Q. Mr. Smith, what is your occupation?

A. Marine diver.

Q. By whom are you employed?

A. Fred Devine Diving Company.

Q. How long have you been engaged in that kind of work?

A. I have been engaged since 1936 in the employment of Mr. Devine, and I started my diving in 1942.

Q. And in diving you use deep sea diving equipment?

A. Use the regulation diving equipment. [171]

Q. Would you tell the Court what types of jobs you have done in connection with that?

A. Well, I have done underwater construction.

Q. Have you done any jobs for the Bonneville Power Administration? A. Yes.

Q. What type of work have you done up there at the dam?

A. I do survey work, go out to survey the con-

(Testimony of Lewis Smith.)

dition of wear of the concrete, and go down on inspection work to see if there is any damage to the racks.

Q. Did you in the year 1952 do any work for Mr. Hathaway here up at Bonneville Dam?

A. Yes.

Q. Do you remember about what time of year it was that you went up there?

A. It was in the fall of the year.

Q. Of 1952? A. Yes.

Q. Did you get any of those lock gates out at that time? A. No.

Q. What did you do at that time?

A. I went down and started burning on the gates, making preparations to get the gates ready to lift.

Q. Which gates were those?

A. Those was your upper gates.

Q. All right. The ones upstream away from the dam; is that [172] right?

A. Yes, the furthest upstream. They would be your No. 1 locks upstream.

Q. How far were they under water?

A. Well, the one gate was up at the time we was up there. One gate was hanging up there against the wall, and that is the gate that we started working on and burning in two so that they could pick it up.

Q. Was there any gate on the bottom of that canal there?

(Testimony of Lewis Smith.)

A. And the other gate he thought was on the bottom, and we found it in two pieces.

Q. Now do you remember how you happened to leave there in 1952? I mean did you complete your work or did you go on to another job of some kind?

A. I went on to another job.

Q. Do you remember what that was?

A. I don't remember just what job that was, there is so many jobs going.

Q. Would that have been a shipwreck down on the Coast here some place?

A. We was on shipwrecks there.

Q. Then did you return to Bonneville to Mr. Hathaway's job later that year or early the next year?

A. If I remember correctly, the water was too high when we returned, and we had to wait until the next year to finish. [173]

Q. Then did you go back there in 1953?

A. Yes.

Q. What time of year was that, if you recall?

A. I believe that was in—we was up there in September in '53.

Q. Of '53. What work did you do then with respect to those upper gates? Were they removed at that time?

A. We went down and burned holes in those to lift them.

Q. Were they lifted out? A. Yes.

Q. Did you at that time make any survey of the downriver gates, the two sets?

(Testimony of Lewis Smith.)

A. After he picked the gates out, then I went down and made a survey of the lower gates.

Q. Would you tell the Court what you found with respect to those lower gates?

A. Well, I went down and found the gates in a very twisted position. At the top the gates was sprung downstream until they overlapped approximately five feet on the top.

Q. What was the effect of that overlapping as far as diving operations were concerned?

A. Well, it would be a hard situation to determine where to start working in order to free the gates, or what they would do, due to the extreme current there, what they would do when you did release them. [174]

Q. There were two lower sets of gates; is that correct? A. Yes, two lower sets of gates.

Q. You have described one as being overlapped and sprung. Was that the upper or the lower of those two sets?

A. That would be the upper set.

Q. All right. Now what was the condition of the lower set?

A. The lower set was in an open position, and, as I understand it, those was only used for dewatering the locks. They wasn't used in navigation of the locks. They was open, and, as I understood it, those gates was fastened in that open position. None of the mechanism had been taken out that holds those gates open, that operates the closing and shutting of the gates, and debris, rocks and logs and

(Testimony of Lewis Smith.)

gravel was piled up in such a condition that you wouldn't be able to—you would have to remove that before you would be able to get in there to free those gates. Then you would have to work at an angle and find what held those gates in that open position and get that loosened before you would be able to tip your gates and lay them over and burn them in two.

Q. I see. And would it or would it not have been hazardous to attempt to remove that upper set of the two from a diving point of view?

A. It would have been very hazardous, and if you had removed the gates and got them laying on the bottom I believe you would have created such a current through there you wouldn't have [175] been able to work on them after they was laying on the bottom.

Q. Would it have been possible to do it any other way?

A. The only way it would have been possible to do it any other way would be to have some equipment big enough to lift the whole gates without burning them, so they could lift the whole gate without burning it in two, and be able to work them free and pull them out of there after they were burned loose.

Q. Was there any equipment available at Bonneville that could do that? A. No.

Q. You have mentioned debris in there on those lower gates. What was the nature of that debris? Was it fine silt or was it something else?

(Testimony of Lewis Smith.)

A. It was rocks and gravel and sticks, chunks—

Q. Any trees? A. Trees.

Mr. Cosgrave: You may cross-examine.

### Cross-Examination

By Mr. Harr:

Q. Mr. Smith, your deposition was taken by plaintiff's counsel in my office last Tuesday or Wednesday evening?

A. Yes. That was Monday.

Q. And on that occasion you examined what purported to be a copy of the exhibit that you now have in your hands; is that [176] correct? That is Plaintiff's Exhibit 7. A. Yes.

Q. I believe you estimated when your deposition was taken that this debris that you found upon examination of the lower open gates that existed there was approximately the same depth as is shown on this exhibit? A. Yes.

Q. That was your testimony? A. Yes.

Q. I believe you testified that it was approximately 15 feet, or something of that kind, approximately 15 feet of debris?

A. Yes, approximately 15 feet.

Q. And you testified also, as you have here, that there was some gravel that had filled in over the years, and that there was a current such as a whirlpool that could have brought that gravel in; is that right? A. Yes.

(Testimony of Lewis Smith.)

Q. I believe you said also that there were some logs lying there? A. Yes.

Q. I don't believe you mentioned trees, but there were some logs there?

A. Well, it is possible trees, chunks of trees.

Q. That was not an unusual situation, was it?

A. Not the trees drifting in there, that is not. Trees will [177] drift in in pretty near any condition.

Q. You found the same condition existing down at what I believe you call the trash racks at the dam itself? A. Yes.

Q. The Bonneville engineers have racks down there and they attempt to catch this debris and the stuff that comes down the river so as to keep it out of the turbines, I suppose? A. Yes.

Q. That is a part of your work that you do for the engineers, Mr. Smith? A. Yes.

Q. You go down and examine that stuff and survey it?

A. Yes. Well, I go down—they have equipment there that they rig those racks to keep the logs and chunks and things off of the racks. But when they remove the racks so that they can remove the rocks and gravel and get it clean, I have to go down and survey it and see that their racks is completely on the bottom and that everything is clean there so that they can put their racks back in place so that nothing goes through the turbines, when they open the turbines up, so that the enclosure inside the racks is clear when they put their racks back in.

(Testimony of Lewis Smith.)

Mr. Harr: Your Honor, may we have the deposition that was handed to the clerk by the reporter? May I have the seal broken so that I may have reference to it at this time?

The Court: Yes. [178]

Mr. Harr: May the record show that I am opening the envelope containing the deposition. I have had the deposition marked as Plaintiff's Exhibit 15.

The Court: It may be marked.

(Deposition of Lewis Smith, above referred to, was marked by the clerk Plaintiff's Exhibit 15.)

Mr. Harr: Also, your Honor, there was tendered the other day at the trial of this case certain photostats representing the log entries of the derrick Cascade. They were not admitted in evidence at that time, and I should like to have those marked also, if I may, as Plaintiff's Exhibit 14.

The Court: They may be marked.

(Photostatic copies of the log entries referred to were marked by the clerk Plaintiff's Exhibit 14.)

Q. (By Mr. Harr): Now, your testimony on Tuesday and your testimony today is that when you went down to examine the upper side of the lower gates you found the condition to be that the wings of the gates as they closed, one overlapped the other? A. Yes.

Q. Is that correct? A. Yes.

(Testimony of Lewis Smith.)

Q. And by virtue of that overlapping that permitted a current of water to go through? [179]

A. Yes.

Q. I believe you said also that at least one of those wings was sprung. That is correct, isn't it?

A. Yes.

Q. That was your testimony?

A. They would have to be sprung to overlap five feet. They would have to be sprung that much, to overlap five feet.

Q. You testified that if the hinges were burned off you would have to fight your gate loose where it overlapped? A. Yes.

Q. And let them tip over on the bottom. There was about 75 feet of water at that particular point?

A. Yes.

Q. Do you know about how high the gates were themselves?

A. The gates was different lengths, I think, and I don't recall taking an exact measurement on the height of the gates.

Q. The tops of the gates were under water, however? A. Yes, the top of the gates.

Q. About how many feet, approximately?

A. I would say they was about 15 feet.

Q. Now, the current is greatest, isn't it, at the time of day when it is necessary to have a big load of electricity? That is when the current is the greatest?

A. That is when the current is the greatest, and you don't have any slack current if they have enough

(Testimony of Lewis Smith.)

water in the river [180] to run generators at full speed all the time. The only time you have any slackness in the water is at the time that the river is low enough that they don't have enough water to run the generators at full capacity, and they will build up their pond a little bit after the peak load. They will slow the generators down and let the pond raise, and then speed the turbines up with a greater flow of water at such time as the peak load is on.

Q. But there were periods of the day ordinarily where it was comparatively slack water; isn't that right?

A. Well, it wasn't what you would call slack, but it would slow down, a lot less current than at the time that they was running full loads, at full capacity of the water.

Q. Now, I believe you said that the debris that you mentioned as having accumulated in this particular area was not an unusual situation to expect?

A. No, being as the locks wasn't used, as to how it got in there or where it come from, why, that would be a question. You would have to examine it and experiment before you would find where it come in there from.

Q. Now, if you had gone up there in March of 1952, or immediately preceding that, and had you been asked by Mr. Hathaway to make a survey of the conditions then and there existing, and if you found the condition as is reflected by the exhibit

(Testimony of Lewis Smith.)

you have in your hand and as you later found on your actual survey, what [181] would have been your advice to Mr. Hathaway as to the removal of those lower gates?

A. I would have told him it would not have been practical to take them out.

Q. Why?

A. Due to the condition of the water, the current, and due to the condition of the gates being sprung and no equipment heavy enough to hold the water or the gate while you were working on them. It would take a heavier equipment to hold them due to the current in there than what it would to actually lift the gate, because you would have to have a safety factor in there when you have hold of something like that, because you get a much greater load with something like that, with your current against it, than you do just picking it in slack water. You have to have quite a percentage of safety factor on your overload to pick something like that.

Q. That canal was about 90 feet across, wasn't it? A. Yes.

Q. So the gates themselves would be approximately 45 feet long? A. Yes.

Q. Did Mr. Hathaway ever consult with you before March 20th, 1952, and ask you to make such a survey, or did he ask you for any advice as to the conditions then and there existing?

A. No, he never made any to me. If he made any to the company I don't know about it. But as far as to me, he never made any. [182]

(Testimony of Lewis Smith.)

Q. You state that it would have taken some very heavy equipment to have lifted those lower locks out of the water? A. Yes.

Q. They would have had to have been lifted out as one unit?

A. Due to the water conditions I would say so, they would. With my experience with underwater burning, if you would open them up and lay those on the bottom where it would be a safe condition to burn, it is my belief that the water would be so swift you wouldn't be able to work down there.

Q. Well, the upper two gates of the lower set were in a closed position and that acted as a dam in itself, didn't it? A. Yes.

Q. You have had a lot of experience in diving and watching experienced salvage operators?

A. Yes.

Q. What is your opinion as to whether or not an experienced salvage operator would have attempted to have lifted those gates out of the water with the currents then and there prevailing and the conditions that you found?

A. Well, I wouldn't say they would not have attempted to take them out.

Q. There has been testimony, Mr. Smith, that when Mr. Hathaway proceeded to work himself at the upper gates, which the Cascade eventually lifted out, he had rigged up a device where there was—I think he called it a deadman, a log laid into a [183] hole and covered up, and to that was attached a line and a block and tackle. A. Yes.

(Testimony of Lewis Smith.)

Q. And the block and tackle at the other end of the line then extended down to the top of the gate?

A. Yes.

Q. And then the block and tackle line was connected to a Cat, and they were able by the Cat pulling on this block and tackle to raise the upper gates up four or five feet, as I remember, above the surface. Now, that had been Mr. Hathaway's original plan of operation. Would that have been a practical plan to have removed these lower gates?

A. No. On that upper gate what he was lifting up—he wasn't lifting the full weight of the gate with what equipment he had there. He still wasn't lifting the full weight of the gate, because the gate was broke in two and dropped down. He was lifting it up until such time as he was lifting on the other piece.

Q. It had already been broken in two?

A. Yes.

Q. That is, the gate was lying on the bottom of the river that you speak of now?

A. That is the one that was standing up on the wall.

Q. It was broken in two?

A. It wasn't clear broke in two, but one half, one section of [184] it was lying flat on the bottom. If it had been in one piece it would have been up as high as its original position against the wall.

Q. I believe his original plan was to raise these sections above the water for a given area and then

(Testimony of Lewis Smith.)

by tying up the gate so it would stay in that position burn off a top section and take that out, and then proceed to raise it further and burn off other sections.      A. Yes.

Q. Was that a practical method, in your opinion, to have completed the undertaking, even of the upper gates?

A. Well, that all depends on somebody's view of it. From my viewpoint I wouldn't attempt to do it that way without having equipment that you could lift it. Your practical way would be to lift it with some special machinery that you could lift it, unless you burned it in small enough pieces that you can handle them with light, smaller equipment, because on your underwater work it is not very practical to burn very much under water.

Mr. Harr: Your Honor, we will offer in evidence Plaintiff's Exhibits 14 and 15.

The Court: They are admitted.

(Photostatic copy of pages from the log of the Cascade, above referred to, were received in evidence as Plaintiff's Exhibit 14; the deposition of Louis Smith, [185] above referred to, was received in evidence as Plaintiff's Exhibit 15.)

Mr. Harr: No further questions.

#### Redirect Examination

By Mr. Cosgrave:

Q. Just one thing, Mr. Smith. Was there any gravel on those lower gates, in behind the gates, the

(Testimony of Lewis Smith.)

ones that were open, between the gates and the canal? A. Yes.

Q. How high was that?

A. That was right to the top of the gate, wedged in.

Q. Was there gravel and rock in the ledges of the gates themselves, the ones that were closed?

A. Yes.

Q. How high up did that come?

A. That come up just about as high as your debris, and maybe two sections higher than what the debris was right behind the gates.

Q. Mr. Harr inquired of you as to whether Mr. Hathaway asked you in 1952 if it was impractical to get at those lower gates and get them out, and you said that you would have so advised him. Did the Army Engineers ever ask you as to whether it was practicable to take those out?

A. No. [186]

Q. If they had asked you you would have told them the same thing; is that correct? A. Yes.

Mr. Cosgrave: No further questions, your Honor.

#### Recross-Examination

By Mr. Harr:

Q. Mr. Smith—this perhaps should have been covered on my cross—you are familiar with the way they make these hydrographic surveys?

A. Yes.

Q. They make soundings and they drop a weight,

(Testimony of Lewis Smith.)

and they measure the distance the weight goes down, and through that they make a hydrographic survey? A. Yes.

Q. In making hydrographic surveys of that kind, and as you have examined Plaintiff's Exhibit 7, would they have had any knowledge of what type of material was at the base of the canal?

A. No, they wouldn't have knowledge only of what they touched at the top, and then it would be a question of what they was hitting. In your hydrograph you get a sounding record at your highest point.

Q. I believe your testimony was that that hydrographic survey in your opinion was substantially correct? A. Yes. [187]

Mr. Harr: That is all.

Mr. Cosgrave: No further questions.

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[Endorsed]: Filed August 21, 1956. [188]

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### PLAINTIFF'S EXHIBIT No. 1

#### General Sale Terms and Conditions

1. Inspection—Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the places and times specified in the Invitation. The Government will not be obliged to furnish any labor for such purpose. In no case will failure to inspect

constitute grounds for a claim or for the withdrawal of a bid after opening.

2. Condition of Property—All property listed herein is offered for sale "as is" and "where is," and without recourse against the Government. If it is provided herein that the Government shall load, then "where is" means f.o.b. conveyance at the point specified in the Invitation. The description is based on the best available information, but the Government makes no guaranty, warranty, or representation, expressed or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose, and no claim will be considered for allowance or adjustment or for rescission of the sale based upon failure of the property to correspond with the standard expected; this is not a sale by sample.

\* \* \*

5. Payment—Payment of the balance of the purchase price, if a deposit has been made, or otherwise of the full purchase price, shall be made by cash, or by certified check, cashier's check, bank draft, postal or express money order, payable to the Treasurer of the United States. Unless otherwise specified by the Government, payment of the full purchase price, subject to any adjustment for variation in quantity or weight pursuant to Condition No. 8, must be made prior to the date specified for removal and prior to delivery of any property. If any such adjustment is necessary, then payment must be completed, unless otherwise specified by the Government, immediately

subsequent to adjustment. If the successful bidder fails to make full and final payment as herein provided, the Government reserves the right, upon written notice to the successful bidder, to sell or otherwise dispose of any or all of such property in the Government's possession and to charge the loss, if any, to the account of the defaulting bidder. The original Purchaser will in no way be released from full compliance with the terms and conditions of the sale by his resale of the property.

6. Title—Title to the items of property sold hereunder shall vest in the Purchaser as and when full and final payment is made, unless otherwise specified by the Government, and except that if the contract provides that loading will be performed by the Government, title shall not vest until such loading and such payment are completed. On all motor vehicles and motor-propelled or motor-drawn equipment requiring licensing, a certificate of release, Standard Form 97 (or a State certificate of title, if such a certificate of title has been issued to the Government), will be furnished for each such vehicle and piece of equipment.

7. Delivery and Removal of Property—The Purchaser shall be entitled to obtain the property upon vesting of title of the property in him, unless otherwise specified in the Invitation to Bid. Delivery shall be at the designated location, and the Purchaser shall remove the property at his expense. The Purchaser shall reimburse the Government for any damage to Government property caused by the re-

moval operations of the Purchaser. If the Purchaser fails to remove the property within the specified time, the Government shall have the right to charge the Purchaser and collect upon demand a reasonable storage charge if the property is stored on premises owned or controlled by the Government, or store the property elsewhere, for the Purchaser's account, and all costs incident to such storing, including handling and moving charges, shall be borne and paid by the Purchaser; in addition to the foregoing rights, the Government may, after the expiration of thirty (30) days after the date specified for removal, and upon ten (10) days' written notice (calculated from the date of mailing) to the Purchaser (which ten (10) days' written notice, may at the option of the contracting officer, be included either partly or wholly in the thirty (30) days specified above or may be in addition thereto), resell the property, applying the proceeds therefrom against the storage and any other costs incurred for Purchaser's account. Any details regarding removal of the property as may not be provided for herein, shall be arranged with the contracting officer, which arrangement shall be reduced to writing.

\* \* \*

15. Disputes—Except as otherwise specifically provided in this contract, all questions of fact involved in disputes arising under this contract shall be decided by the contracting officer, whose decision upon said facts shall be final and conclusive upon the parties, subject to written appeal by the Pur-

chaser within thirty (30) days to the head of the department or his duly authorized representative, whose decision on said facts shall be final and conclusive upon the parties hereto. In the meantime, the Purchaser shall diligently proceed with performance.

\* \* \*

Bid Invitation No. 22C-52.

### Special Conditions

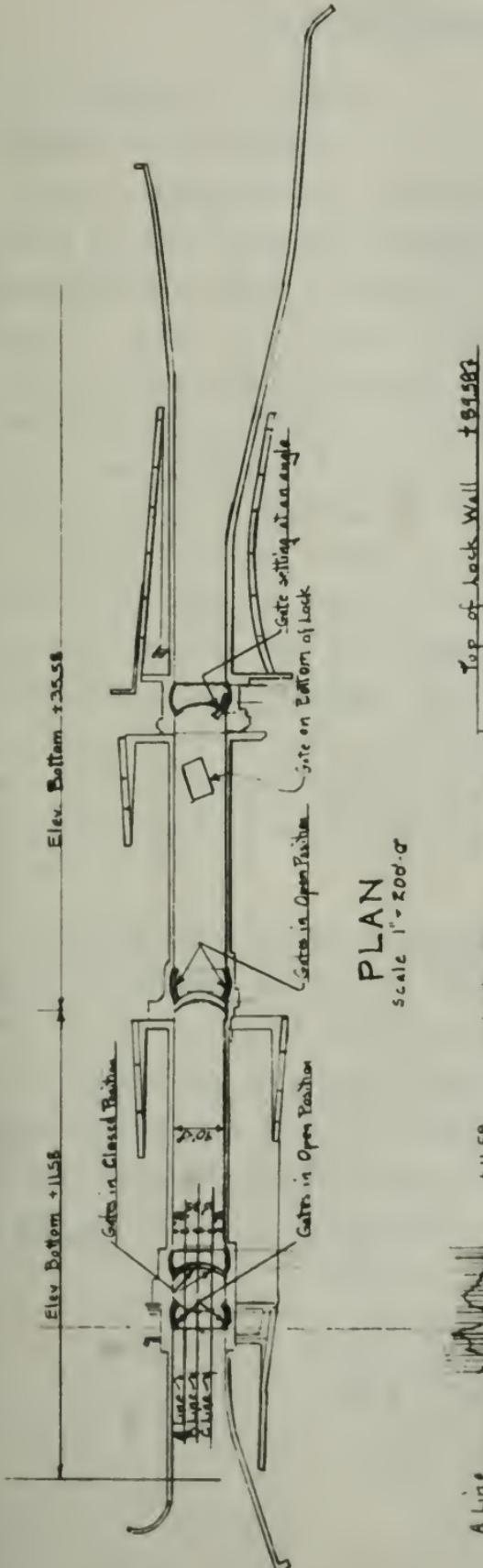
Property is sold "as is, where is." In subsequent disposal by the contractor of any scrap purchased hereunder, disposal of such scrap shall be subject to allocation by the National Production Authority, U. S. Department of Commerce, or other comparable Government Agency, in conformance with existing law.

Attached hereto is print covering recent hydrographic survey of the old locks showing approximate height of water, approximate positions of various gates and silting condition at bottom of locks.

Interested bidders may examine print showing design of gates and manner in which they are secured to lock walls by applying at 678 Pittock Block.

Authority: Public Law 152, 81st Congress, as amended by Public Law 754, 81st Congress.

2nd Endorsement, OCE, ENGWO, dated 5 January, 1952.



PLAN  
Scale 1" - 200 ft

Top of rock wall + 855 ft

13558

SECTION

† 11.58

Data from lead-line soundings of 13 Feb 1952

## LOCKS

CASCADE LOCKS, OREG.  
FEBRUARY 19, 1932



United States of America,  
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer of United States, reply, pretrial order, memorandum, findings of fact, conclusions of law and judgment, notice of appeal, order extending time, designation of record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7443, in which F. C. Hathaway is plaintiff and appellee, and the United States of America is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I hereby certify that the transcript of testimony dated December 13 and 23, 1955, and the exhibits, will be forwarded at a later date.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of September, 1956.

[Seal]

R. DEMOTT,  
Clerk;

By /s/ F. L. BUCK,  
Chief Deputy.

[Endorsed]: No. 15269. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. F. C. Hathaway, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 10, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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United States Court of Appeals  
Ninth Circuit

No. 15269

UNITED STATES OF AMERICA,  
Appellant,  
vs.  
F. C. HATHAWAY,  
Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

The above-named Appellant, United States of America, intends to rely on the following points on its appeal to the United States Court of Appeals for the Ninth Circuit, to wit:

The District Court erred:

- (1) In failing to find that plaintiff in purchasing the lock gates on an "as is—where is"

basis, bore the entire risk incident to removability of the property.

(2) In failing to find that the best information in regard to the lock gates available to the defendant was passed on to the plaintiff, that such information was substantially accurate, and that defendant made no representations or warranties, express or implied, or in any way mislead or misinformed plaintiff as to the difficulty of removal of the property.

(3) In failing to give effect to paragraph 1 of the General Conditions of the Contract which invited and urged bidders to inspect the property offered and provided that "in no case will failure to inspect constitute grounds for a claim \* \* \*."

(4) In finding that the parties were mutually and equally mistaken as to the amount of steel which it was practicably possible to remove from the old Cascade Locks.

(5) In finding that both parties understood that all of such steel could be removed and that neither intended that the contract would include steel which could not be removed.

(6) In holding that the purchase price of the contract should be reduced by one-half.

(7) In failing to hold that the complaint was subject to dismissal for failure of plaintiff to exhaust the administrative remedy available to him under the disputes clause of the contract.

(8) In granting judgment for the plaintiff.

(9) In failing to grant judgment for the defendant on its counterclaim.

Dated this 10th day of September, 1956.

C. E. LUCKEY,  
United States Attorney,  
District of Oregon;

By /s/ VICTOR E. HARR,  
Assistant U. S. Attorney,  
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 11, 1956.